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No. 84-457

In the
Supreme Court of the United States
OCTOBER TERM 1984

MORTON L. MINSKY, Individually and on behalf of all others similarly situated,

Petitioner.

v.

AUTO DRIVEAWAY COMPANY, et al.,

Respondent.

REPLY BRIEF OF PETITIONER

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There are two arguments raised in respondents-defendants' brief in opposition which were not addressed in petitioner's-plaintiff's petition for a writ of certiorari. They are addressed herein.

First, defendants contend that "a ruling in this case will not create a rule of law having application to other cases." (Respondents' Brief p. 4.) That is true, defendants reason, because the ICC's regulatory authority over motor carriers was altered subsequent to the time of defendants' price fixing conspiracy by the Motor Car-

riers Act of 1980, Pub. L. 96-296, 94 Stat. 793. If anything, however, a ruling in this case will have greater effect due to these changes.

The instant case involves the issue whether defendants who act outside the established process for obtaining ICC approval of rate-making agreements and collusively set their rates can escape liability for antitrust damages in a civil action. Plaintiff maintained that "[t]he creation of an antitrust exemption for certain rate-making activities implies that rate-making activities outside the exemption are actionable," citing *United States* v. *Borden Co.*, 308 U.S. 188 (1939); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966). (Petition, p. 7.) Respondent states that it "does not disagree." (Brief in Opposition, p. 8.)

By amending the procedure by which motor carriers may obtain approval of rate-making agreements through enactment of the Motor Carrier Act of 1980, Congress did not alter the rights of parties who act outside of the regulatory process and collectively set their rates. Therefore, a ruling in this case would be applicable to cases involving activities which fall outside the antitrust exemption contained in the Interstate Commerce Act, as amended by the Motor Carrier Act of 1980.

The amendments to the Interstate Commerce Act contained within the Motor Carrier Act of 1980 militate in favor of granting the petition for writ of certiorari. The 1980 amendments contain two significant changes. First, Congress stated, in part, that it is a goal of our national transportation policy to reduce "unnecessary regulation by the Federal Government" and increase the role of competition in the motor carrier industry. 94 Stat. 793,

Sec. 2 and 3(a). Second, Congress narrowed the types of activities by rate bureaus which are exempt from antitrust scrutiny. 94 Stat. 803-806, Sec. 14(a). Such deregulation indicates that there is an even greater need to further define the interaction between the antitrust laws and the regulatory process.

The second issue raised by the defendants is that review is inappropriate because plaintiff failed to pursue administrative remedies. However, the ICC does not have exclusive primary jurisdiction over plaintiff's claim. Generally, under the doctrine of primary jurisdiction, courts should defer to administrative agencies "whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956). See also *Atlantic Coast Line Railroad Co.* v. *Riss & Co.*, 267 F.2d 659, 660 (D.C. Cir.), *cert. denied*, 361 U.S. 804 (1959). In the instant case, there is no need to defer to the ICC. Plaintiff challenges conduct which is clearly outside the antitrust exemption for ratemaking agreements under the Interstate Commerce Act.* Furthermore, unlike *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), this case does not involve a challenge to rates found to be reasonable by the ICC. Defendants' rates automatically became effective without any kind of determination by the ICC. Under

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* Indeed, the defendants have already been found guilty of a criminal price-fixing conspiracy. It is now merely a question of whether the victims of that conspiracy can recover damages for the injuries they have suffered.

these circumstances plaintiff's right to proceed in court should be deemed to be collateral to any rights he may have had to seek relief before the ICC. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 222, 224 (1966).

Plaintiff's petition for a writ of certiorari should be granted.

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